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Supreme Court of the United States

OCTOBER TERM, 1992

GENE McNARY, Commissioner, Immigration and Naturalization
Service, *et al.*,

Petitioners,

vs.

HAITIAN CENTERS COUNCIL, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF OF HUMAN RIGHTS WATCH,
AMICUS CURIAE, IN SUPPORT OF RESPONDENTS**

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992
No. 92-344

GENE MCNARY, COMMISSIONER, IMMIGRATION
AND NATURALIZATION SERVICE, *et al.*,

Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF
AS *AMICUS CURIAE*

Pursuant to Rule 37.4, Human Rights Watch hereby moves for leave to file the accompanying brief as an *amicus curiae* in support of the position of the respondents in this case. The parties' consent has been received.

Human Rights Watch is a nonpartisan, nongovernmental organization based in New York. It has submitted *amicus curiae* briefs to this and numerous other U.S. courts, and has substantial expertise on questions of international human rights law.

Through Americas Watch, one of its regional divisions, Human Rights Watch monitors and reports on civil and political rights conditions in Latin America and the Caribbean, including Haiti. Members of its staff regularly travel to Haiti to conduct interviews with victims and witnesses of human rights violations as well as to meet with government officials responsible for human rights matters.

Human Rights Watch believes that its detailed knowledge of human rights practices in Haiti and of related international human rights standards will assist this Court in determining whether Executive officials, consistent with international and domestic prohibitions of the forced return of refugees, may forcibly repatriate Haitian boat people who are interdicted on the high seas without screening to exempt those with well founded fears of persecution because of their political beliefs. Human Rights Watch thus seeks leave to file the accompanying *amicus curiae* brief.

Dated: New York, New York
December 21, 1992

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BRIEF OF *AMICUS CURIAE*
HUMAN RIGHTS WATCH

Human Rights Watch submits this brief as *amicus curiae* urging affirmance of the order of the U.S. Court of Appeals for the Second Circuit.

INTEREST OF *AMICUS CURIAE*

Human Rights Watch is a nonpartisan, nongovernmental organization based in New York. The largest U.S.-based international human rights organization, it is composed of five

regional divisions: Africa Watch, Americas Watch, Asia Watch, Helsinki Watch and Middle East Watch, as well as the Fund for Free Expression and various special projects. Human Rights Watch monitors violations of civil and political rights worldwide, including summary executions, torture, imprisonment for nonviolent speech or association, violations of due process, and mistreatment of refugees. Its reports on human rights conditions regularly receive significant attention by the State Department, Congress, the United Nations, the Organization of American States, and the press. By documenting and exposing human rights violations, Human Rights Watch seeks to end abusive practices.

Americas Watch is the division of Human Rights Watch that monitors and reports on human rights conditions in Latin America and the Caribbean. Members of the staff have conducted repeated investigative missions to virtually every country in the hemisphere, including multiple visits to Haiti since the September 30, 1991 military coup and for a number of years before that coup.

Human Rights Watch has appeared as counsel before U.S. courts and both the Inter-American Court and the Inter-American Commission on Human Rights in actions that have raised questions of international human rights law. It has also submitted *amicus curiae* briefs to this and numerous other U.S. courts. Human Rights Watch believes that its extensive knowledge of human rights practices in Haiti and of related international human rights standards will assist this Court in determining whether Executive branch officials may, consistent with international and domestic prohibitions of the forced return of refugees, forcibly repatriate Haitian boat people who are interdicted on the high seas without any screening to exempt from repatriation those with well founded fears of persecution because of their political beliefs.

Statement of the Case

Human Rights Watch relies principally on the statement of facts contained in the respondents' brief. However, certain additional facts are pertinent to the arguments presented in this brief.

On January 30, 1992, the U.S. State Department announced that the U.S. Embassy in Port-au-Prince would establish an in-country refugee processing program. The purpose of the program was "to reach those individuals . . . who [had] valid claims to refugee status" and to urge them "not to put out to sea."¹ Because the program came at a time of pervasive violent persecution of individuals suspected of sympathy for ousted President Jean-Bertrand Aristide or opposition to military rule,² many Haitians did not feel confident remaining in the country to seek refugee status. While some 23,000 Haitians fled to the neighboring Dominican Republic,³ others were discouraged from doing so by the Dominican government's longstanding practice of forcibly recruiting Haitians to cut sugarcane on its plantations.⁴ Large numbers of Haitians thus continued to take to sea, as they had done since early November 1991.

1. Refugee Admissions to the United States for 1993, 138 Cong. Rec. S15,274, S15,278 (daily ed. Sept. 25, 1992).

2. See Americas Watch, National Coalition for Haitian Refugees ("NCHR"), Physicians for Human Rights, *Return to the Darkest Days: Human Rights in Haiti Since the Coup* (Dec. 1991).

3. U.S. Committee for Refugees, *Stone of Refuge: Haitian Refugees in the Dominican Republic* 2 (June 1992); Richard Epstein, *Haiti's neighbor acts tough*, San Francisco Chronicle, June 9, 1992; Wendy S. Tai, *Haitian policy signals U.S. shift on refugees*, Minneapolis Star Tribune, June 22, 1992.

4. See, e.g., the following reports by Americas Watch and NCHR: *A Troubled Year: Haitians in the Dominican Republic* (Oct. 1992); *Half Measures: Reform, Forced Labor and the Dominican Sugar Industry* (March 1991); *Harvesting Oppression: Forced Haitian Labor in the Dominican Sugar Industry* (June 1990); *Haitian Sugar Cane Cutters in the Dominican Republic* (Nov. 1989).

On May 24, 1992, President George Bush responded to the continuing exodus by signing Executive Order No. 12,807, which authorized the summary forcible repatriation of all Haitians interdicted beyond the territorial waters of the United States; the prior practice of screening for and exempting those with credible claims of asylum was ended.⁵ The White House sought to cushion the effect of its actions by noting that Haitians who feared persecution could "avail themselves of refugee processing in Haiti."⁶ Indeed, given the dangers to Haitians of traveling to the Dominican Republic and the poverty that precluded travel elsewhere by air, in-country processing became the sole avenue to refugee status for most Haitians once flight by sea was precluded. Yet, as shown below, the refugee-processing program that has been established in Haiti provides no reasonable guarantee against persecution, either for those who remain in Haiti or for those who are forced back.

The Administration also justified its new policy of forced summary repatriation by citing a survey of Haitians who had been repatriated earlier. Conducted by personnel from the State Department and the Immigration and Naturalization Service (INS) based in the U.S. Embassy in Port-au-Prince, the survey purports to show that repatriated Haitians face no risk of persecution. As State Department spokesman Richard Boucher explained at a press briefing on May 26:

We also continue our efforts to monitor the welfare of repatriated Haitians. The de facto authorities in Haiti have made a commitment not to harm these people. And we're out checking on it. Our Embassy officers have contacted over 2,000 repatriated Haitians in the capital, and in the countryside, both through spot checks and by following up specific allegations of mistreatment. In no

5. 57 Fed. Reg. 23,133 (1992).

6. 138 Cong. Rec. S15,274, S15,278 (daily ed. Sept. 25, 1992).

case have they found evidence of mistreatment connected to their repatriation.⁷

As shown below, whether by design or negligence, the State Department-INS survey was so deeply flawed that it demonstrated little, if anything, about the fate of Haitians who are returned forcibly and summarily pursuant to the May 24 Executive Order.

Summary of Argument

While denying that either the international prohibition of *refoulement* or its domestic codification extends to the conduct of U.S. officials on the high seas, the Bush administration has advanced two arguments to suggest that summary forcible repatriation does not constitute *refoulement* even if the prohibition has an extraterritorial reach. First, it contends that the program established to evaluate the claims of would-be refugees within Haiti provides adequate protection against persecution of summarily repatriated Haitians. Second, it contends that its survey of repatriated Haitians proves that they face no danger of persecution. Both of these arguments are groundless.

In-country processing in Haiti does not prevent persecution of summarily repatriated boat people. Many would-be refugees are deterred from applying for refugee status by the real and perceived dangers associated with both the military checkpoints that must be crossed on the way to Port-au-Prince and a notoriously abusive police facility that is located only two blocks from the processing center. In addition, the months of waiting before an interview is scheduled, an application is processed, and post-adjudication processing is completed leave even those who do apply for refugee status in dangerous limbo while the arduously slow process runs its course. Moreover,

7. See also State Department spokeswoman Margaret Tutwiler, press briefing (Feb. 3, 1992); State Department spokesman Richard Boucher, press briefings (Feb. 14 & 18, 1992).

many applicants are unfairly denied refugee status because of the unjustified insistence on written preliminary applications in a largely illiterate country, an unreasonable demand for documentary evidence of persecution, and an inappropriate interpretation of the well-founded-fear-of-persecution standard to require prior personal experience of persecution.

The survey of repatriated Haitians conducted by U.S. officials based in the U.S. Embassy in Haiti is no more persuasive in demonstrating that repatriated Haitians do not face persecution or in rebutting extensive evidence collected by Human Rights Watch showing widespread violent repression to which repatriates have fallen victim. First, it is unclear whether the claim that no evidence of mistreatment was found "connected to their repatriation" refers only to persecution because of the fact of repatriation (a tiny subset of the possible bases for a refugee claim) or persecution because of political opinion (the correct refugee standard). Second, even if broader forms of political persecution were examined, the sample was artificially skewed. The majority of the participants in the survey were interviewed at a time when roughly 30 percent of the boat people -- presumably those with the strongest claims of persecution -- were being screened into the United States from Guantánamo; the survey thus says relatively little about the risks now faced when all boat people are repatriated. Third, the interviews were frequently conducted in public settings where many of those most at risk of persecution would not dare venture, and where even those who had faced persecution would be reluctant to speak candidly. As Human Rights Watch's extensive field research has shown, many Haitian boat people have been arrested, imprisoned and otherwise persecuted since their return to Haiti, the government's claims notwithstanding.

Argument

I. IN-COUNTRY PROCESSING AS IMPLEMENTED IN HAITI DOES NOT ENSURE THAT SUMMARILY REPATRIATED BOAT PEOPLE AVOID PERSECUTION

To justify the summary forcible repatriation of Haitian boat people, the Bush Administration has pointed in part to its program for in-country processing of would-be refugees. Given the difficulties inherent in any in-country processing program, Human Rights Watch doubts that one can ever be fashioned to ensure that forcibly repatriated refugees do not encounter renewed persecution. At minimum, such a program would have to identify all repatriates who have a well founded fear of persecution and protect them from persecution until they are sent safely abroad -- a standard that is appropriate because while would-be refugees have no right to be admitted to any particular country, they have a right not to be summarily and forcibly repatriated unless their freedom from persecution can be guaranteed. The in-country processing program as implemented in Haiti wholly fails to provide such a guarantee.

A. Congress Never Intended In-Country Refugee Processing To Be the Sole Means of Escaping Persecution

The Refugee Act of 1980⁸ ("Refugee Act") protects not only those fleeing persecution who are outside their country -- refugees as defined by international law -- but also certain would-be refugees who remain in their country. Yet this new form of protection was never meant to supplant traditional refugee guarantees.

8. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

One of the primary objectives of the Refugee Act was to bring the United States into compliance with the 1967 United Nations Protocol Relating to the Status of Refugees ("U.N. Protocol"),⁹ which the United States had ratified in 1968, and with the United Nations Convention Relating to the Status of Refugees,¹⁰ which is incorporated by reference into the U.N. Protocol.¹¹ The Refugee Act adopted the definition of "refugee" contained in the U.N. Protocol.¹² Similarly, Congress made compliance with the prohibition of *refoulement* (contained in Article 33.1 of the U.N. Protocol¹³) mandatory rather than discretionary. *INS v. Stevic*, 467 U.S. 407, 422 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987).

In one respect the Refugee Act was more generous than international practice. While the U.N. Protocol recognizes as refugees only those individuals who are outside their country of origin, Congress allowed the President, after appropriate consultation, to include people who remain within their home country. 8 U.S.C. § 1101(a)(42)(B). Congress's purpose was to maintain "flexibility to deal with crises such as the evacuation of Vietnam in 1975 and to respond as well to situations in countries such as Cuba or Chile . . . where there are political

9. Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

10. July 28, 1951, 189 U.N.T.S. 150.

11. See H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 2, 19, reprinted in 1980 U.S.C.C.A.N. 160; S. Rep. No. 256, 96th Cong. 2d Sess. 4, 9, reprinted in 1980 U.S.C.C.A.N. 144, 149.

12. 8 U.S.C. § 1101(a)(42)(A) substantially adopts the definition of refugee in Art. I.2 of the U.N. Protocol.

13. The prohibition reads in pertinent part: "No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his . . . political opinion."

detainees or prisoners of conscience"¹⁴ To protect people facing persecution who are trapped in their own country and thus unable to apply for refugee status from a third country, Congress authorized in-country refugee processing. However, by recognizing the possibility of individuals applying for refugee status from within their home countries, Congress intended to provide an additional avenue of protection, not to authorize a means of precluding traditional avenues for protecting refugees who have managed to leave their country.¹⁵

Since the passage of the Refugee Act, in-country processing, sometimes called an Orderly Departure Program, has been instituted in only four countries -- Vietnam, the former Soviet Union, Cuba and Romania. In none of these countries did Congress or the Executive intend in-country processing to be the sole means of escape for would-be refugees,¹⁶ or a justification for thwarting other means of flight. To the contrary, the U.S. government, including the Bush Administration, has harshly criticized countries that have forcibly repatriated

14. 126 Cong. Rec. 4499 (1980) (statement of Rep. Holtzman).

15. See 126 Cong. Rec. 4499 (1980) (statement of Rep. Holtzman); Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 39-40, 46-47 (1981); Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 82 (statement of Leonard F. Chapman, INS Commissioner).

16. At a June 11, 1992 hearing before the House Subcommittees on International Operations and Western Hemisphere Affairs, Rep. Solarz commented: "In the Soviet Union, Cuba, Vietnam, and Romania, in-country processing has been an alternative option for those with the inclination, courage and gumption to use it. But it has never been the exclusive option, and it is clear that making it the exclusive option does not conform to international law." *Congress, Courts React to Presidential Order Turning Back Haitian Boat People*, Refugee Rep., June 19, 1992, at 11, 14.

Vietnamese asylum seekers,¹⁷ even though in-country refugee processing has existed almost continuously in Vietnam since 1980.¹⁸

B. As the Sole Means of Refugee Adjudication for Most Haitians, In-Country Processing in Haiti Provides, at Best, Limited and Inadequate Protection

Quite apart from Congress's intent, refugee processing as implemented in Haiti does not begin to guarantee that repatriated boat people can avoid persecution. The dangers inherent in passing through pervasive military roadblocks on the way to Port-au-Prince, as well as the perceived risk of being in the vicinity of one of Haiti's most notorious detention and torture centers (described below), which is only two blocks from the processing facility, deter many who are at risk of persecution from even applying for refugee status. The lack of protection during the lengthy delays while refugee claims are processed compounds the dangers facing would-be refugees. And unjustifiably stringent adjudication procedures leave many legitimate refugees unprotected.

17. See, e.g., Statement of State Department Spokesman Richard Boucher, June 5, 1991 ("We oppose involuntary return to Vietnam under current conditions there."); Barbara Basler, *Vietnamese Resist Repatriation Plan*, The New York Times, October 19, 1991 (quoting Assistant Secretary of State for East Asian and Pacific Affairs Richard Solomon: "We are opposed to the forced repatriation of people from Hong Kong to Vietnam, particularly given the current circumstances in that country.").

18. Since 1979, in-country processing in Vietnam has been suspended only between January 1, 1986 and September 1987. Orderly Departure Program Hearing, 101st Cong., 1st Sess. 7-8 (1989) (statement of Robert Funseth, Dep. Asst. Secretary, Bur. of Refugee Aff., Department of State).

1. The Dangers Inherent in the Procedure for Processing Refugee Claims in Haiti Deter Many Would-be Refugees From Applying

Between February and October 1, 1992, processing of refugee applications took place in the U.S. Consulate and the U.S. Embassy in Port-au-Prince. Both of these compounds are seen by many Haitians as "forbidding, potentially dangerous places for Haitians."¹⁹ They are in exposed areas of downtown Port-au-Prince, near Haitian government buildings, and are heavily guarded and surrounded by high walls. Many Haitians did not "dare risk a visit for the slim chance at refugee status."²⁰ Haitians wishing to apply for refugee status had to stand in line outside the Consulate for several hours to receive information about the application process, and to return several times for interviews with consular staff and INS adjudicators. The delays and possibilities for exposure were strong deterrents to the many victims of political persecution who were hiding from the Haitian army.²¹

Despite some initial equivocation on the point, U.S. officials in Port-au-Prince conceded to Human Rights Watch that would-be refugees who were afraid personally to visit the Embassy or Consulate had no other reliable avenue for pursuing their claims. On June 11, 1992, then U.S. Ambassador to Haiti Alvin Adams told Human Rights Watch that Embassy staff gladly leave the compound to interview people who want to apply for refugee status but are afraid to enter the facility. On June 14, however, consular officer Kyle Boyce qualified this statement, explaining to Human Rights Watch that first the potential refugee applicant must call or write the Embassy to explain why he or she fears applying in person. Within three

19. Joint Appendix ("J.A.") 420-23, Plaintiffs' Exhibit ("P.E.") 86, May 11, 1992.

20. *Id.*

21. J.A. 425-27, P.E. 87, May 26, 1992.

weeks, even this position seemed to have been abandoned. On July 6, consular officer Dennis Hankins admitted to Human Rights Watch that the staff will not leave the Embassy to interview potential refugee applicants who are afraid to come to it. Instead, he said, refugee claimants are allowed to "drive their cars right inside the Consulate compound" -- a meaningless, even cynical, alternative for most Haitians whose dire poverty precludes them from owning a car or knowing anyone who does.

Since October 1, 1992, the processing of refugee applications in Haiti has been moved out of the Consulate to a new processing center that has been set up in the Banque Nationale de Paris (BNP) building on the corner of Rue John Brown and Rue Lamarre. While the commercial setting provides some added degree of anonymity for refugee applicants, it remains an intimidating site. Located about a mile from the Consulate, the BNP building is in downtown Port-au-Prince within two blocks of the headquarters of the Investigations and Anti-Gang Service of the Port-au-Prince Police -- a site long associated with torture and gruesome mistreatment of perceived political opponents.²²

Visiting the refugee processing program is also not a viable option for the vast majority of Haitians who live outside the capital. To enter Port-au-Prince from the countryside, one must pass through numerous military roadblocks that line the handful of routes.²³ Few would-be refugees who are being sought by the army would risk detection at these roadblocks. Moreover, many Haitians simply cannot afford bus fare to the

22. See Americas Watch, NCHR, Caribbean Rights, International Commission of Jurists ("ICJ"), *Reverting to Despotism: Human Rights in Haiti* 15-16, 23-24, 58-59 (March 1990); Americas Watch, NCHR and Caribbean Rights, *The More Things Change...Human Rights in Haiti*, 65-70 (Feb. 1989).

23. See J.A. 420-23, P.E. 86, May 26, 1992. Even foreigners are not immune: Americas Watch researchers have been searched at military roadblocks on several occasions while conducting investigations in Haiti since the coup.

capital, let alone the expense of supporting themselves in Port-au-Prince while their refugee applications are being processed. These obstacles preclude large numbers of Haitians from pursuing refugee claims.

2. Many Haitians Are Unable To Follow Application Procedures

A Haitian wishing to apply for refugee status must complete a four-page questionnaire written in French and Creole. Although three-fourths of all Haitians cannot read or write, would-be refugees are not automatically given assistance in completing this critical questionnaire. From February until June 1992, consular staff helped refugee applicants to fill out the questionnaire on a walk-in basis. The Consulate ended this practice when refugees began to flood the Consulate in June. Thereafter, applicants who sought assistance in completing the questionnaires were given appointments. This practice, too, was discontinued in July.²⁴ Since October 1, the International Organization for Migration (IOM), the intergovernmental voluntary agency designated by the State Department to assist with refugee processing, will assist Haitians in completing the questionnaire if the applicant knows enough to ask for help.²⁵ About 50 percent of the applicants receive such assistance.²⁶ An IOM spokeswoman admitted that many Haitian applicants might have a problem understanding the questionnaire because of their limited reading and writing ability.²⁷

24. Telephone interview with Kenneth Foster, a program officer with U.S. State Department Bureau for Refugee Programs ("Foster Interview") (Dec. 16, 1992); Telephone interview with Francis Sullivan, International Organization for Migration Chief of Mission, Washington, D.C. ("Sullivan Interview") (Dec. 17, 1992).

25. Sullivan Interview (Dec. 18, 1992).

26. *Id.*

27. Sullivan Interview (Dec. 3, 1992).

3. Haitians Are Not Receiving Fair, Consistent, or Timely Review of their Claims

In addition, in-country applicants are not receiving timely review of their claims. Between February 1992, when the in-country processing program began, and November 27, some 4,700 applicants had completed preliminary questionnaires and returned them to the Consulate.²⁸ Of these, only 2,200 cases had been adjudicated by the INS.²⁹ The remaining 2,500 cases will take an estimated 40 weeks to adjudicate if no new cases come in, and an estimated 100 weeks at the current rate of new cases.³⁰

In light of this substantial backlog, the Consulate has attempted to prioritize applications. The refugee coordinator, Dennis Hankins, reviews the preliminary questionnaires and categorizes, or "vets," the applicants as "A," "B" or "C" on the basis of their likelihood of acceptance as refugees.³¹ "A"

28. Would-be refugees often submit applications that include children or spouses. The 4,700 applications concern some 6,800 individuals.

29. These statistics are drawn from a State Department fact sheet, Statistics on Haiti In-Country Refugee Program Through November 27, 1992.

30. The INS adjudicated 252 cases in November 1992, or about 63 cases per week. Foster Interview (Dec. 16, 1992). Forty to sixty new cases continue to come in each week. Telephone interview with Dennis Hankins, refugee coordinator at the U.S. Consulate in Port-au-Prince ("Hankins Interview") (Dec. 10, 1992).

31. When asked about the standards that he uses in making his decisions, Hankins said that there are "no set criteria." Hankins Interview (Dec. 10, 1992). Kenneth Foster, the State Department program officer, said that "the guidelines are clear." An "A" applicant includes "likely target[s] of persecution," such as "former members of the Aristide government, former political prisoners, persons in lead positions in local or national community or religious organizations" or persons "in prominent fields likely to be persecuted." An "A" applicant is someone who tells a "credible story that [he or she] has been individually targeted and has a well founded fear of individual persecution." A "B" applicant is "less specific" and makes "no claim of individual persecution." (continued...)

applicants are moved to the top of the list for an interview with IOM staff.

Hankins told Human Rights Watch that he did not know how long a person at each of the three priority levels must wait for the first interview with the IOM or for the eventual INS adjudication.³² The "best case scenario," he said, would be for consular staff within several days of receiving the preliminary questionnaire to contact the person by phone to schedule an interview. If the person has no phone (the norm in Haiti) the Consulate will send out a notice of an interview time by mail -- usually for two to three weeks later.³³ More often, according to the IOM, "a couple of months" are required for even an "A" applicant's case to be scheduled for the initial case presentation at the IOM office. "B" applications -- the majority of those received -- are processed even more slowly, and none of the "C" applications has yet been interviewed.³⁴

These delays are extremely troubling given that the in-country processing program, if it is even to begin to justify summary forcible repatriation, must at minimum ensure that repatriates do not face political persecution. A Haitian fleeing threatened detention, beating or execution by the army could easily face a delay of a month or more (likely much more) under the best of circumstances while his application is processed. Moreover, given the difficulty that many Haitians will have understanding and completing the preliminary questionnaire, there is a substantial risk that an individual will

31. (...continued)

A "C" applicant is someone who is clearly "not a target of persecution." Foster Interview (Dec. 16, 1992).

32. Hankins Interview (Dec. 10, 1992).

33. *Id.*

34. Sullivan Interview (Dec. 3, 1992). The 885 "C" applications, as of November 27, have been "put on the back burner." *Id.*

be wrongly classified a "C" applicant and thus face indefinite delays before his or her application is considered.

After the IOM interview, an applicant's file is forwarded to INS staff in the refugee processing center for adjudication, which usually takes place within a week. The applicant then must reappear at the refugee processing center to pick up the INS's decision, which may be ready as quickly as two days or as long as two weeks later.³⁵ Even if granted refugee status, an applicant ordinarily must wait some additional two months for post-adjudication processing, including medical clearance and an assurance of sponsorship by a voluntary agency in the United States.³⁶ At times, it may take up to four or five months before a person granted refugee status is able to leave Haiti. Human Rights Watch is aware of at least two Haitians approved as refugees in July 1992 and one approved in mid-August who were still being processed in Haiti as of December 15.

Another troubling aspect of the in-country processing program is the inconsistency and quality of INS adjudications. Since October 1, three temporary-duty INS adjudicators from the United States have averaged some six interviews a day per officer during their 30-day rotations in Haiti.³⁷ While an INS spokeswoman told Human Rights Watch that an attempt has been made to find adjudicators with asylum training, they come from a "variety of positions," ranging from criminal investigators to deportation officers, and none has had any prior experience

35. Telephone interview with Kathleen Thompson, senior refugee officer for the INS Office of Refugees, Asylum and Parole ("Thompson Interview") (Dec. 17, 1992). According to Thompson, "special arrangements" can be made to mail decisions to persons living outside of Port-au-Prince. *Id.*

36. Foster Interview (Dec. 16, 1992).

37. Thompson Interview (Dec. 8, 1992).

working in Haiti.³⁸ As might be expected from officers whose mission in the United States is law enforcement rather than refugee-protection, the interviews in some cases are extremely adversarial and unfriendly.³⁹ In contrast to the officers in the INS asylum unit, who receive voluminous information on country-specific human rights conditions and extensive training on issues of cross-cultural sensitivity, the immigration enforcement officers currently adjudicating claims in Haiti have only a short time to familiarize themselves with the morass of political and popular organizations with which the would-be refugees may be affiliated.⁴⁰

4. The In-Country Processing Program in Haiti Is Impermissibly Stringent in Both the Substantive Standard Applied and the Nature of Proof Required

The in-country processing program employs such a high substantive standard and requires such extensive documentary proof that unjustifiably few would-be refugees qualify. Of the 2,282 cases that were adjudicated between the program's debut in February and December 4, only 131 applicants and their families were conditionally accepted as refugees -- an approval rate of less than 6 percent.⁴¹ By contrast, at Guantánamo

38. Thompson Interview (Dec. 17, 1992).

39. J.A. 420-23, P.E. 86, May 26, 1992. See INS, *Worldwide Guidelines for Overseas Refugee Processing* (Aug. 1983) ("The atmosphere of the interview should not be adversarial. It should be conducted so as to gather information to achieve an equitable decision."); U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Status* (1979) ("U.N. Handbook") at 48 (examiner must create a "climate of confidence").

40. The INS is seeking applicants to begin one-year positions in Port-au-Prince beginning in March 1993, so that the staff will be "more consistent" than under the present system of rotating adjudicators. Thompson Interview (Dec. 8, 1992).

41. Hankins Interview (Dec. 10, 1992).

10,700 of 36,000 Haitians were found to have "credible claims" of persecution, allowing them to pursue asylum claims in the United States -- an initial approval rate of close to 30 percent.⁴²

The Consulate's dangerously stringent evidentiary requirements is illustrated by the case of one applicant for refugee status, Carl Henri Richardson.⁴³ In the fall of 1990, Richardson, 36, a resident of Jean Rabel in northwestern Haiti, had helped to found a local committee for Lavalas and the National Front for Change and Democracy (FNCD) -- the political movements through which Father Aristide ran for president. After Aristide's election, Richardson was appointed municipal registrar (*officier de l'état civil*) -- a post in which he continued after the military coup of September 30, 1991. On November 11, 1991, Richardson was arrested in front of his office and held for 13 days in prisons in Jean Rabel and the provincial capital of Port-de-Paix. While in custody, he was forced to watch soldiers viciously stomp on five suspected members of the Tèt Kole movement, a peasants association long associated with opposition to military rule.

In June 1992, after months in hiding because of continuing attacks on his family and property, Richardson heard on the Voice of America that people facing persecution could apply for refugee status at the U.S. Consulate. On June 19, after waiting for more than two hours on the street in front of the Consulate, he was admitted to the compound and granted a brief initial interview. The consular officer who interviewed him

42. See J.A. 429-32, P.E. 88, May 6, 1992. One factor in the different approval rates was the relative dangers involved in seeking refugee status. While those most at risk of persecution may be unwilling or unable to risk encountering the military roadblocks on the way to Port-au-Prince or the abusive police in the vicinity of the processing center, those heading for Guantánamo could more easily evade these threats by leaving from numerous possible sites along Haiti's extended coastline. The placement of Coast Guard cutters just over the horizon also minimized the risk of taking to sea in small, overcrowded boats.

43. This account is taken from an interview with Richardson on July 20, 1992.

said that to obtain refugee status Richardson needed documentary evidence to prove that he had been imprisoned.

As a result, Richardson returned to northwestern Haiti to seek such proof. On July 8, while he waited for a letter from a local justice of the peace verifying his imprisonment, soldiers arrested him for a second time, took him to the military post at Môle Saint Nicolas, ripped out one of his toenails, and beat him for three hours on his head, shins, buttocks and feet, until he lost consciousness, blood ran from both ears, and he could no longer see out of his right eye. He remained jailed for a week.

After interviewing Richardson in late July, Human Rights Watch contacted the U.S. Consulate. Only then did an official say that he was "very interested" in speaking with Richardson, and arranged an interview the next morning. Although Richardson was granted refugee status in mid-August 1992, the Consulate's prior insistence on documentary proof of persecution cut against the INS's own guidelines, which state that "[t]he bona fide refugee is not likely to have in his possession conclusive evidence of his past persecution or his fear of persecution," and that the applicant's burden of proof "may be established by his statements to the extent that they are consistent and credible"⁴⁴

Judging by the decisions rendered so far, the substantive standard employed by the Consulate also appears to be wrong. The INS's Worldwide Guidelines for Overseas Refugee Processing (Aug. 1983) make clear that a personal experience of persecution is not required to demonstrate a well founded fear of persecution:

44. INS, *Worldwide Guidelines for Overseas Refugee Processing* (Aug. 1983). See also U.N. Handbook at 47 ("Often . . . an applicant may not be able to support his statement by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule.")

An applicant who falls within a group widely accepted as having suffered persecution (e.g., members of the former military) should be considered a refugee even though he may have personally escaped persecution, either through concealment or luck. Requiring an individual showing is contrary to the law; all that he need show is a reasonable fear of persecution. Evidence of persecution against a group to show likelihood of persecution against an individual is a proper and correct implementation of case-by-case processing.

Refugee status may be based upon persecution suffered in the past *or* upon the likelihood of future persecution. The presence of either condition is sufficient; the presence of both conditions is not required. (Emphasis in original.)

However, Human Rights Watch's field research has shown that the refugee processing in Haiti apparently requires refugee applicants to demonstrate that they already have experienced arrest or physical mistreatment, rather than that they have a well founded fear that they might face persecution. Those who seek to establish a well founded fear of persecution only on the basis of their association with groups that have been persecuted are routinely turned down.

Four cases followed closely by Human Rights Watch because of the strength of their claims -- two that were provisionally accepted and two that were rejected -- demonstrate this pattern. One of those accepted, Octalouis Desnoyer, had been a member of a popular organization (much despised by the military) known as KOMILFO and had been an activist for Aristide's FNCD party in the 1990 elections. He had spent six months in prison where he was repeatedly beaten and tortured.⁴⁵ The other, Jean Guilnord Telisma, had been followed and threatened after the coup by soldiers of two Port-

45. Interview with Octalouis Desnoyer (June 19, 1992).

au-Prince-based military/police units, apparently for having worked as a personal security guard for Aristide's Minister of Information following a decade of activism with the popular church.⁴⁶

The claims of the two rejected candidates were at least as compelling as that of Telisma, the second man accepted. One had been employed by the Aristide government as a messenger in the Ministry of Foreign Affairs after having worked for years with Aristide at his church of St. Jean Bosco in the Port-au-Prince slums. The man, whose name is omitted for his protection, had a photograph of himself with Aristide at the church, and other documents to prove his employment by the Aristide government and his leadership position in a progressive youth organization in Port-au-Prince.⁴⁷ The other rejected applicant, who also asked that his name not be revealed, was a soldier who had deserted his post on October 3, 1991 because he feared persecution as an Aristide supporter. He had ample documentation of his position in the military. In addition, in early June 1992, his home in the northern town of Lhomonde was searched by six armed and uniformed soldiers. Although the man was not at home at the time, his mother was so frightened by the soldiers' aggressive questioning about her son's whereabouts that she fainted.⁴⁸

The case of the Haitian army deserter also illustrates the procedural difficulties inherent in pursuing in-country processing for those who fear persecution. Human Rights Watch interviewed the former soldier in Port-au-Prince in June 1992, at a time when he was in hiding. Because of the serious threat to his safety and his lack of money or a place to stay in Port-au-Prince, Human Rights Watch tried to arrange an immediate meeting for him at the U.S. Consulate. Consular official Dennis

46. Interview with Jean Guilnord Telisma (June 19, 1992).

47. Interview with the unidentified man (June 1992).

48. Interviews with the unidentified man (June & July 1992).

Hankins said by telephone that the Consulate could not see him without Human Rights Watch first writing a letter of support to obtain an appointment. Ultimately, after considerable insistence, the man was allowed to fill out a refugee questionnaire, and that afternoon received a date for an INS interview. In the meantime, he was compelled for his safety to return to hiding. His refugee application was rejected on July 24, 1992.

The Consulate's rejection of applicants such as this soldier reflects an apparent standard for accepting refugees that requires not a well founded fear of political persecution but a personal experience of persecution. In the majority of cases with which we are familiar, those accepted as refugees have already suffered imprisonment, beatings, torture or other direct persecution, while those who lack this history of personal persecution are rejected, even if their reasons for fearing persecution are compelling. This and the other shortcomings noted above demonstrate that in-country processing cannot prevent forcibly repatriated boat people from encountering persecution upon their return to Haiti, in violation of the international and domestic prohibition of *refoulement*.

II. CONTRARY TO THE PURPORTED SHOWING OF THE GOVERNMENT'S SURVEY, REPATRIATED HAITIANS FACE SERIOUS POLITICAL PERSECUTION

The Bush Administration has also sought to justify forcible summary repatriation of Haitian boat people by pointing to a survey it conducted of some 3,000 repatriates. However, whether by design or negligence, the survey was deeply flawed and cannot begin to account for the level of persecution faced by forcibly returned Haitians. Human Rights Watch's extensive field work in Haiti has shown not only that the Haitian army continues to detain, beat and kill perceived opponents of military rule, but also that repatriated Haitians have encountered such persecution.

A. Extensive Field Research of Human Rights Conditions in Haiti Reveals Systematic Persecution of Perceived Military Opponents

In addition to numerous earlier investigations, Human Rights Watch conducted a fact-finding mission to Haiti between June 5 and July 30, 1992, during the first two months of the summary repatriation program. Bilingual Creole and English-speaking researchers traveled to eight of Haiti's nine departments, including some of the country's least accessible regions, to interview some 250 people, including members of human rights organizations, representatives of international aid and development organizations, and victims of human rights abuses. In numerous cases, Human Rights Watch researchers were forced to conduct interviews secretly, to avoid putting their sources at risk of retaliation from local military officials who have banned meetings of any sort within their territory. The majority of the informants asked that their names not be revealed out of fear of reprisal.

Contrary to the Bush administration's claims, Human Rights Watch found a pattern of widespread and severe repression of individuals affiliated with any group that is viewed by the Haitian military as opposed to its continuing rule. Seeking to avoid the kind of popular unrest that has brought down past military regimes, the army -- from the generals heading the governing junta to the section chiefs wreaking havoc in the most remote country hamlets -- has attempted to eviscerate all civic, popular and professional organizations that are seen not to accept either the overthrow of President Aristide or the installation of military government. Leaders of grass-roots organizations that assist Haiti's poor, students, teachers, journalists, lawyers, trade unionists, and religious workers have been hunted down and arrested, beaten or killed by soldiers and section chiefs. Individuals found distributing pro-Aristide materials have also been severely treated. Short-term detention is widely used to intimidate and subdue. Almost all arrests are warrantless. Beatings during detention are the rule rather than the exception. And to this day, some perceived

political opponents continue to face execution and forced disappearance.⁴⁹

B. Repatriated Boat People Are Among Those Who Continue to Face Persecution in Haiti

Claims by the Bush Administration notwithstanding, Human Rights Watch has found that Haitian boat people have been arrested, imprisoned or otherwise persecuted after being returned to Haiti. Commonly, repatriates are questioned about their reasons for leaving the country. Many "double-backers" -- Haitians who set to sea a second time after being forcibly returned by the Coast Guard -- have reported retaliation by Haitian authorities after their return to Haiti. INS officials in Guantánamo found many of these accounts persuasive and admitted the Haitians to the United States on their second pass through Guantánamo. In October and November 1992, whole boatloads of returned refugees have been detained by the Haitian police for questioning after U.S. Coast Guard cutters deposited them on the docks in Port-au-Prince. Some have been held overnight in police lockups and others jailed for longer periods. Selected repatriates continue to be fingerprinted and occasionally photographed.⁵⁰

The following are a few of the many cases investigated by Human Rights Watch:

- o On May 16, Luckner Jean, a 38-year-old repatriate from Fort Royal, was seized by a soldier in Petit Goâve who kicked and punched him and demanded information: "Where are your friends who came back with you from Guantánamo?" The soldier took Jean to the local army

49. Results of our research are contained in a report scheduled for publication in January 1993, and can be found in abbreviated form in the chapter on Haiti in the Human Rights Watch World Report (Dec. 1992).

50. Telephone interview with Nancy Jackson, desk officer for Haiti, State Department Bureau of Inter-American Affairs (Dec. 17, 1992).

post where he was hit with a truncheon and cables, which lacerated his back. He was released the same day and, with his wounds not yet healed, he fled the country by boat again the following day.

- o On August 14, 154 people were arrested by Haitian police and forced onto buses bound for Port-au-Prince police headquarters shortly after being repatriated by the U.S. Coast Guard cutter Confidence. A Haitian Red Cross official, Jonel Charles, said that four repatriates from the group ran off and managed to escape arrest. According to the Haitian police, the rest were taken into custody for questioning about the reported hijacking of the boat in which they had been attempting to flee.⁵¹ The next day, police said that all but six of the refugees had been released; the alleged organizer of the voyage and five crew members remained in custody. In early October, Human Rights Watch learned that one person arrested on August 14 was still in police custody.
- o 164 Haitians repatriated on October 27 were put onto two buses and taken to police headquarters in Port-au-Prince, where they were questioned about who had organized their voyage, and why they had tried to leave the country. All but four were let go the same day.
- o On November 30, the Coast Guard repatriated 321 refugees. After processing by the Red Cross and the INS on the docks, the entire boatload was taken to the police post on the wharf for questioning. According to a witness who was present during the questioning, the police asked each person, among other things, why he or she had left the country. Fourteen were held in custody as alleged organizers of the trip.

51. Barbara Crossette, *Haiti arrests 150 returned by the U.S.*, New York Times, Aug. 15, 1992.

The Bush Administration has tried to dismiss these arrests as mere criminal investigations of the organizers of the boat trips. But none of those held as alleged trip organizers, many of whom have been detained for days, is known to have appeared before a judge or to have been formally charged with any crime. Arresting entire boatloads of people for questioning amounts to penalizing people for leaving Haiti, particularly when they are asked about their reasons for fleeing Haiti.

C. The Government's Survey of Repatriated Haitians Is Deeply Flawed

The survey of some 3,000 repatriates cited by the Bush Administration to defend its policy of forced summary repatriation is deeply flawed in several respects, and does not reliably measure the degree of persecution faced by summarily repatriated Haitians.⁵²

First, it is unclear whether the Administration believes the surveys demonstrate that repatriates face no persecution at all or simply no persecution for having been repatriated. State Department spokesman Richard Boucher appeared to be making only the latter, considerably weaker claim, when two days after the institution of forced summary repatriation he announced in reference to the survey: "In no case have they

52. Our analysis of the U.S. government's efforts to monitor repatriated boat people in Haiti is based on:

- o more than 200 pages of unclassified telegrams from the U.S. Embassy in Port-au-Prince, sent between mid-February and mid-April 1992, which recount in considerable detail visits to different towns and regions as well as the results of interviews with repatriates;
- o two 11-page Justice Department reports summarizing visits by INS officials; and
- o information obtained from depositions taken of several government officials, especially Gunther Wagner, the author of one of the Justice Department reports.

found evidence of mistreatment connected to their repatriation."⁵³ Even if no repatriate faced persecution merely for having been repatriated, that obviously says nothing about persecution for other political reasons.

Second, since two-thirds of the 3,000 repatriates interviewed for the survey were seen while screening was still under way in Guantánamo,⁵⁴ the survey says relatively little about the treatment of boat people when all were forcibly and summarily returned to Haiti, without first exempting those most likely to encounter political persecution. Some 10,700 Haitian boat people, roughly 30 percent of the total interviewed at Guantánamo, were found by INS adjudicators to have credible claims of persecution in Haiti and thus were not repatriated. A survey conducted largely in a pool from which those at greatest risk of persecution had been removed (by granting them refugee status) says little about the fate of the pool of Haitians today, all of whom who are summarily and forcibly returned.

Third, the methods used to locate repatriates, including reliance on the Haitian Red Cross and contact with local provincial military commanders, ensured that only those individuals who felt comfortable appearing in public were likely to be interviewed. The more at risk of persecution one felt, the less likely it is that one would dare to appear publicly for an interview.

Fourth, interviews were not conducted in confidential circumstances. For example, an Embassy report on a March 24-26 trip to Haiti's Grand Anse reveals that a soldier was present during interviews in the town of Dame Marie. Questioning

53. Press Briefing (May 26, 1992).

54. Some 2,000 repatriates were interviewed before summary repatriation began. Since then, consular officers have left the Consulate to investigate another 1,000 repatriates. Currently, the only monitoring that is being done is "through review of the refugee claims made [at the Consulate] by repatriates." Hankins Interview (Dec. 10, 1992).

returnees under such circumstances impedes candid description of persecution and deters others who have experienced persecution from meeting with Embassy investigators at all.

Fifth, the primary purpose of the survey appears to have been to discredit any claim of persecution. Investigators were chosen who were expert in the detection of fraudulent claims, rather than knowledgeable about conditions in Haiti or the conduct of human rights field investigations. While detection of fraudulent accounts is a legitimate element of a monitoring effort, the reports reviewed suggest that this aim dominated the investigations. For example, INS intelligence expert Gunther Wagner, who seems to have been responsible for at least 600 of the 3,000 repatriate interviews, knew next to nothing about Haiti and very little about U.S. refugee law. He made his first visit to the country in December 1991, and before starting his interviews received only a one-hour background briefing on country conditions.⁵⁵

These fundamental flaws in the survey's methodology leave it incapable of refuting the findings by Human Rights Watch and other human rights monitoring organizations that (a) in-country processing was never intended as, and does not in fact provide, an adequate alternative to traditional processing of refugees, (b) many forcibly repatriated boat people face a serious risk of persecution, and (c) some Haitian repatriates have in fact encountered persecution. The Bush Administration's summary forcible repatriation of Haitian boat people thus violates the prohibition of *refoulement* contained in international and U.S. law.

55. J.A. 434-62, P.E. 89, May 5, 1992. Wagner's limited knowledge of the Haitian political scene -- something of unquestionable value in such work -- is revealed in answers he gave in his deposition. Asked what political parties are active in Haiti, he mentioned having heard of the "FCND," and the "KAK" or "KPK" -- none of which exist. Asked for the popular nickname given ousted President Aristide, he responded, again incorrectly, "They call Aristide Kiki." *Id.*

Conclusion

For the reasons set forth above, this Court should affirm the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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